FOR ARGUMENT

MAR 02 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

—v.—

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RICHARD A. GARDNER, M.D., *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

ALAN SILBER
177 Prince Street
New York, New York 10012
(212) 677-1004

Attorney for *Amicus Curiae*

BEST AVAILABLE COPY

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF RICHARD A. GARDNER, M.D., AMICUS CURIAE, IN SUPPORT OF RESPONDENT

This brief amicus curiae is being filed pursuant to Rule 36.2 with the written consent of the petitioner and the respondent. It is directed at communicating to the Court the conclusions I have come to after many years of experience in evaluating claims of sexual abuse upon a narrow issue,

i.e., whether it is helpful or hurtful to the child and the truth-seeking process for the allegedly abused child to be in a face-to-face situation with the accused. My interest in this matter flows from more than 30 years of experience in the field of child psychiatry and very extensive involvement in the issue of the proper means for differentiating between genuine and fabricated child sex abuse, upon which subject I have published a book and numerous articles. In preparation for this brief I have examined the brief submitted by the State of Maryland as well as the *amicus* brief submitted by the American Psychological Association (hereinafter the APA), as well as the *amicus* brief submitted by the APA to this Court in 1987 in *Kentucky v. Stincer*.

To assist the Court in evaluating the merit of my judgments and opinions, there is

attached as an appendix hereto a foreshortened version of my *curriculum vitae*.

My main point is that whatever procedure is employed--whether it be in a courtroom setting or in a mental health professional's office--face-to-face contact between the accuser and the accused is absolutely essential to an examination designed to determine with reasonable reliability the question whether sexual abuse has occurred. In my opinion, such a face-to-face experience is essential to permit the fact-finder, whoever it may be, to observe the interactions betwen the accuser and the accused when they confront each other. This is just as much a requirement for a child witness as it is for an adult witness. The most valuable and predictable way of learning the truth is allowing the accused and the accuser to have a direct verbal confrontation which is observed by the fact-

finder. Whether or not this motivated the placement of the confron-tation clause in the Constitution, I am certain that in modern day life it is a critical component of a fair evaluation of claims of sex abuse of children.

The Issue of Psychological Trauma

Confronting a child in order to learn whether or not sexual abuse has taken place is inevitably traumatizing to the child. Whether the inquiry takes place on the witness stand, in the judge's chambers, in the prosecutor's or lawyer's office, or in the office of a mental health professional, the child is going to be psychologically traumatized. The procedures are strange and frightening to the child. Interviewers, whether they go slowly or quickly, inevitably wish to focus on issues which are embarrassing, anxiety provoking, and laden with tension. In situations in which the

abuse has been genuine, the child may have been threatened (even with death) if the abuse is divulged. And in situations in which the abuse is fabricated, the child is in a loyalty conflict between the adult who has been encouraging and programming the child to fabricate the abuse and the consequences of the allegation to the well-being and life of the accused. Furthermore, the younger the child the more likely the child will try to ingratiate himself (herself) with the evaluator, and this too produces tensions and anxieties because the child fears that he (she) will not get the "right" answers. Because there is no good solution to this problem, because there is no way of protecting the child completely from psychological trauma, the best we can do is utilize those procedures that involve the least degree of psychological trauma. We do well to operate here in compliance

with the principle that we choose the least psychologically detrimental of all the detrimental options without sacrificing the benefits to be derived from the face-to-face confrontation.

The amicus brief submitted by the APA does not address itself to the psychological trauma of the accused's being falsely convicted and sometimes incarcerated. Although there are certainly many bona fide sex abuse perpetrators who were found not to be guilty by judges and juries, there are also many innocents who are in jail because they were falsely found guilty of sex abuse. The APA brief focuses exclusively on the child; yet I am sure those who formulated the APA brief are well aware of the psychological trauma that a falsely accused person suffers throughout the course of the investigation and trial, and especially if incarcerated. This person's psychological

trauma must also be considered unless we start with the assumption, even in advance of the court's truth-seeking process, that the accused is guilty and therefore the trauma to his psyche is irrelevant. Even without incarceration, and even without conviction, the very allegation has often ruined lives. The accused's psychological trauma is intensified by the sense of impotency experienced in the courtroom, which does not permit the direct, face-to-face interchange in which the two can communicate with one another in some fashion. This element in the psychological trauma to the accused is reduced to the extent that the accused is at least able to see his or her accuser face-to-face.

I recognize that in some cases such direct confrontations may be psychologically detrimental to the child. But we are not dealing here with a situation in which we

can hope for complete protection from such trauma for any of the involved parties. Moreover, I am in agreement with the APA's position that some children may benefit from the experience of testifying against their abusers. Confronting the accused provides the child with a sense of power, release of anger, and some sense of control. The child is participating in the process which may bring about future protection from the accused.

The "Scientific" Basis For The APA's Position

As the Court probably already appreciates, psychology and psychiatry are far from being exact sciences. Often the word "scientific" is included in our publications in order to compensate for the basic weakness of some of our arguments. There are certain areas within these fields in which scientific objectivity is possible,

but interviewing allegedly sex abused children is not one of them. Accordingly, the Court does well, when considering the APA brief, to recognize that when the word "scientific" is being used, it is done in the service of trying to bolster what is probably a weak argument. I myself, recognizing that my brief is also subjective and empirical, have not used the word "scientific." For every article the APA quotes in support of some position, there is another article that refutes it. And even the brief itself makes reference to these conflicts. There is no study in the field of child sex abuse which is flawless if one subjects the study to the kinds of rigorous scientific criteria utilized in mathematics, physics, chemistry, biology, and engineering.

My main criticism of the APA amicus brief is with its conclusion that the Court allow

for a relaxation of the rights of the accused under the Sixth Amendment to the Constitution by allowing testimony of a child to be taken without the child's confronting the person he or she is accusing. There is in my opinion no "scientific" basis for support of this view; and there is certainly no basis for abandoning the contrary position that the APA presented to this Court in 1987 in its amicus brief in Kentucky v. Stincer.

I am aware that a judgment foreclosing the right of confrontation is supposedly made on an individualized basis after a psycholoigist or other mental health professional testifies as to the traumatic effect on the child in this particular situation. This testimony frequently consists of routine boiler-plate contentions by a professional committed to the prosecution, and since a mental health

examination of the child witness by a defense psychologist is often not permitted, the defendant cannot contest these one-sided claims.

Ways Of Reducing Trauma To Children

All agree that the primary question is what method of inquiry is most likely to enable investigators to learn what really happened. The more effective the method of inquiry, the greater the likelihood the cause of justice will be served. The price that must be paid in the course of such inquiries is psychological trauma. But the psychological risk to all parties--not just the child--must be considered.

There are ways of reducing the potential psychological trauma to the child, which I will discuss below. These do not include eliminating face-to-face meetings with the accused, because by doing so one of the most reliable elements of the truth-seeking

process is eliminated. Thus the task of the legislature and the courts is not to eliminate the right of confrontation but rather to develop means and methods of minimizing the psychological trauma that results from the truth-seeking process.

There are certain practices that can be followed to reduce (but not remove entirely) the psychological trauma of such inquiries. One is to make them short. The greater the number of interviews, and the greater the number of interviewers, the greater the degree of psychological trauma. Prior to the trial, children who allege sex abuse are generally subjected to a series of interviews by prosecutors, child protection team evaluators, lawyers, and mental health professionals. The record in this case shows a clear example of the extent to which the interview and re-interview process is employed to shape the testimony of child

witnesses. To avoid effective corruption of the fact-finding process, the Court must take control of the elaborate interviewing process which predominates in these cases and which frequently produces testimony of questionalbe validity. The trauma to the child is often exacerbated by the pressure to give the interviewer what he or she seeks. And once in court, the courtroom proceedings are predictably drawn out. Direct examination, cross examination, redirect, and recross inevitably add to the duration of the inquiry. Confining the child to yes-no responses further lengthens the duration of the examinations.

Because of the emphasis that has been placed upon denying the right of confrontation, little serious effort has gone into seeking to lessen trauma on both sides because advocates in this field have opted to seek legislation which effectively

removes the right of confrontation.

Conclusion

Recently I wrote:[1]

> [T]he hysteria and fury associated with a sex-abuse allegation may be unparalleled. The sexual exploitation of a child is viewed by our society as one of the most heinous crimes.
>
> ***
>
> Often, incompetent examiners, many of whom are zealots, conduct the evaluations... These individuals also subscribe strongly (and even fanatically) to the position that children never lie and that any allegation of sex abuse must be true. Many of the validators (a loaded title if there ever was one) fear losing their jobs if they conclude that too many of the investigated clients are innocent or the charges unsubstantiated. A whole power structure has grown up in which an army of prosecutors, detectives, investigators, and others rely on a continual stream of positive findings and convictions if they are to justify their ever-increasing demands for more funds from legislatures. If custody litigation is to be considered "a can of worms" then sex-abuse litigation can only be considered "a can of poisonous snakes."

---

[1] Gardner, FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1989).

Any professional familiar with sex abuse charges in custody situations will attest for the foregoing. Any professional who has followed the sorry story of the McMartin case in California, the Scott County cases in Minnesota, and numerous other cases will attest to the foregoing in the criminal law context. The rash of legislation, such as that in Maryland and some 30 other states, providing for the denial of face-to-face encounters between the accused and the accuser is an element of heightened hysteria and a failure to adopt measures which strengthen the truth-seeking process in child sex abuse cases in an effective and constitutional manner.

Respectfully submitted,

ALAN SILBER
177 Prince Street
New York, N.Y. 10012
(212) 677-1004

Attorney for and on behalf
of Richard A. Gardner, M.D.,
Amicus Curiae

APPENDIX

I am a child psychiatrist and adult psychoanalyst. I trained in adult and child psychiatry at the Columbia-Presbyterian Medical Center, New York City, and took my psychoanalytic training at the William A. White Psychoanalytic Institute in New York City. Since the completion of my training in the early 1960s I have been in private practice. I am also on the faculty of the Columbia University College of Physicians and Surgeons and since 1983 have held the academic rank of Clinical Professor of Child Psychiatry.

My involvement in forensic psychiatry began in the years 1960-1962 when I served as chief of child psychiatry at the U.S. Army Hospital in Frankfurt am Main, Germany. During that period I had extensive experience testifying both in miliary and German civilian courts. In the mid-1960s,

with the rising divorce rate, I began involvement in child custody litigation--an involvement which has continued to the present day. I have written two books on the subject of conducting evaluations in child custody litigation[2] and one on the psychological consequences to children and parents resulting from involvement in child custody litigation.[3] All of these books have been considered authoritative sources on the subject of both legal and mental health professionals. Furthermore, I have written approximately 20 articles and book chapters on these subjects, both in legal and mental

---

[2] Gardner, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1982); Gardner, FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1989).

[3] Gardner, CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS. Creative Therapeutics, Cresskill, New Jersey (1986).

health publications, and have lectured extensively on these subjects as well to both legal and mental health professionals throughout the United States and occasionally abroad. My extensive experience in the field of child custody litigation led me to the compelling conclusion that the best and most effecient way to learn the "truth" from litigating parents was face-to-face confrontation.

In the late 1970s I began seeing a relatively new phenomenon, namely, the utilization of fabricated sex abuse allegations in the contest of child custody disputes. In some cases there was <u>bona fide</u> abuse, but in most the allegations were false and designed to wreak vengeance on the accused and/or strengthen the position of the accuser in the custody litigation. Thus began my involvement in differentiating between <u>bona fide</u> and fabricated sex abuse

allegations. These experiences culminated in the publication of my book on the subject.[4] Once again, I lectured extensively in this area to both legal and mental health professionals and have published articles on the subject as well.

My work in the field of custody disputes inevitably led me to the same problem of differentiating between valid and false claims of sexual abuse, as such questions developed in criminal prosecutions.

Also relevant to this brief are my contributions in the area of engaging resistant, uncooperative, and otherwise difficult-to-interview children.[5] I have

---

[4] Gardner, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE. Creative Therapeutics, Cresskill, New Jersey (1987).

[5] Gardner, THERAPEUTIC COMMUNICATION WITH CHILDREN: THE MUTUAL STORYTELLING TECHNIQUE. Jason Aronson Inc., Northvae, New Jersey (1971); Gardner, PSYCHOTHERAPEUTIC APPROACHES TO THE

lectured extensively in this area and my books on the subject have become standard reference works.

RESISTANT CHILD. Jason Aronson Inc., Northvale, New Jersey (1975); Gardner, THE PSYCHOTHERAPEUTIC TECHNIQUES OF RICHARD A. GARDNER. Creative Therapeutics, Cresskill, New Jersey (1986); Gardner, PSYCHOTHERAPY WITH ADOLESCENTS. Creative Therapeutics, Cresskill, New Jersey (1988).